Supreme Court, U.S.
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No. 03-811

IN THE SUPREME COURT OF THE UNITED STATES

PETER J. MINIEL,
Petitioner,

v.

DOUG DRETKE, Director, Texas Department of Criminal Justice, Correctional Institutions Division,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the federal district court's decision that Miniel was not denied constitutionally effective counsel due to trial counsel's decision not to conduct further psychological evaluation of Miniel when counsel's interactions with Miniel as well as a pre-trial sanity and competency examination did not reveal that Miniel potentially suffered from any mental problems is debatable.

2. Whether the federal district court's decision that Miniel was not denied constitutionally effective counsel due to trial counsel's alleged failure to discover evidence of a deprived and abusive family background is debatable.

3. Whether the federal district court's decision that the mitigating evidence proffered at trial was not beyond the scope of the special issues and that Miniel could not premise a mitigating evidence instruction claim on evidence not presented at trial is debatable.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This is a federal habeas corpus proceeding in which Petitioner Peter J. Miniel ("Miniel")[1] unsuccessfully challenged his presumptively valid state capital murder conviction and sentence of death pursuant to 28 U.S.C. § 2254. In the courts below, Miniel alleged, *inter alia,* that he was denied constitutionally effective counsel during the punishment phase of trial because counsel failed to adequately investigate Miniel's mental condition and family background and that he was denied jury instruction on mitigating evidence. However, the federal district correctly rejected these claims under *Strickland*[2] and *Penry*,[3] and their progeny, and the court of appeals's decision to deny Miniel a certificate of appealability ("COA") was correct. As a result, this Court should deny certiorari review.

STATEMENT OF THE CASE

I. Facts of the Crime

The federal district court accurately summarized the evidence supporting Miniel's capital murder conviction in its order denying habeas relief:

> On May 8, 1986, Miniel and James Warren Russell, Jr., drove to Galveston from Houston. Miniel and Russell drove around Galveston

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[1] Respondent Doug Dretke will be referred to herein as "the Director."

[2] *Strickland v. Washington,* 466 U.S. 668 (1984).

[3] *Penry v. Lynaugh*, 492 U.S. 302 (1989).

drinking beer they purchased with a stolen credit card. While driving by the seawall, they saw two men rolling a joint of marijuana. Miniel told the two men that he would buy gasoline and beer for them in exchange for marijuana. The two men, Sammy Rogers and Chris Miln, told Miniel to follow them back to Houston to get some marijuana.

When the group arrived at an apartment in Houston, [Paul] Manier was just getting out of the shower. After a while Miniel, Miln, and Rogers left to find some marijuana and to take Miln home. When Miniel and Rogers returned from acquiring marijuana, they all sat around smoking joints and drinking beer. Rogers eventually passed out. Miniel then told Russell that he thought Manier had money and that they should rob him. Miniel concocted a plan where Russell would pretend to procure some cocaine, distracting Manier so they could render him unconscious. Russell went out to his car, pretending to retrieve cocaine. When he returned, he found Miniel and Manier in Manier's bedroom. Russell saw Manier clean a small mirror to use in snorting cocaine. While Manier leaned over the mirror, Miniel struck him in the back of the head with a beer mug. Manier fell to his knees, covering his head while Miniel continued to strike him. After Manier fell on his side, Russell hit him several times in the head with a shock absorber that had been sitting on a table. Miniel told Russell that he was not hitting him hard enough and then used the shock absorber himself. When Miniel found that he could not knock out Manier, he told Russell to stab him with a small knife. Russell was unable to carry through with this

> order, and Miniel himself stabbed Manier numerous times. Russell then held Manier while Miniel attempted to slit his throat. Finally, Miniel attempted to asphyxiate him by shoving a blanket down his throat.
>
> Miniel took Manier's wallet and became angry when he discovered that they killed a man for only twenty dollars. They then searched the apartment for drugs or money. Miniel and Russell left the apartment, stealing Manier's stereo equipment. They washed off Manier's blood and hid the knife. Miniel and Russell then went to Burger King to eat hamburgers.
>
> Miniel was eventually arrested at his sister's apartment in Chicago, Illinois. The police recovered some of Manier's stereo equipment from another individual in the apartment building. At a Chicago police department substation, Miniel made an oral statement confessing to Manier's murder.

Miniel v. Cockrell, Civil Action No. H-00-4361, slip op. at 1-4 (S.D. Tex. Oct. 29, 2001) (unpublished opinion) (internal record citations omitted); Petitioner's Appendix 35-37.

II. Facts Relating to Punishment

The federal district court also accurately summarized the punishment phase evidence as follows:

> During the punishment phase of Miniel's trial, the State reintroduced all the evidence from the guilt/innocence phase. The State also introduced evidence of Miniel's many prior offenses in

Illinois. The State introduced evidence of Miniel's guilty plea to a charge of aggravated battery resulting from beating his girlfriend with a wooden spoon and a motorcycle chain. The State also introduced another previous charge of aggravated battery where Miniel beat someone with numchucks. Other offenses adduced by the State included two unlawful-use-of-weapons charges, a retail theft charge, and a charge of disorderly conduct. The State also presented evidence of Miniel's poor parole history. The State demonstrated that Miniel did not have a reputation as a peaceful and law-abiding person.

Miniel called three witnesses in the punishment phase. Darryl Hendrichson, a Harris County Sheriff's Department employee in the Harris County jail, testified about Miniel's behavior while incarcerated. Hendrichson testified that Miniel had never presented a disciplinary problem during his incarceration before trial.

Carol Ruth Weed, a prospective juror in Miniel's case, also testified in his behalf. After she was dismissed from jury service, Weed felt that she had made a connection with Miniel. Weed visited him in jail every week while he awaited trial. They spoke mostly about religion and she opined that Miniel's religious inclination was genuine, not "foxhole religion."

Finally, the defense called Juan Cortez, an assistant Harris County chaplain. Cortez testified that Miniel attended church service almost every week while incarcerated. Cortez testified that Miniel's religious devotion seemed sincere. Cortez testified

> that those in society who accept their guilt and seek to be an instrument for good in society should be given a second chance.

Miniel v. Cockrell, slip op. at 4-6 (internal record citations omitted); Petitioner's Appendix 38-39.

III. Procedural History

Miniel's conviction (October 10, 1988) and death sentence (October 12, 1988) — for the capital murder of Paul Manier — were affirmed on direct appeal on January 29, 1992, and this Court denied certiorari review. *Miniel v. State,* 831 S.W.2d 310 (Tex.Crim.App.), *cert. denied*, 506 U.S. 885 (1992). Miniel then filed a state application for writ of habeas corpus in the trial court raising, among other things, the substantive claims presently before this Court. The trial court entered findings of fact and conclusions of law recommending that Miniel's application be denied. SHTr[4] 1172-1200; Petitioner's Appendix 69-96. The application was denied by the Court of Criminal Appeals based upon the trial court's findings of fact and conclusions of law. *Ex parte Miniel,* No. 42,833-01 (Tex.Crim.App. Dec. 15, 1999) (unpublished order); Petitioner's Appendix 33-34.

One day before the limitations period expired, December 14, 2000, Miniel filed a 173- page federal habeas petition raising twenty-four claims for relief. On October 29, 2001, the district court granted the Director's motion for summary judgment and denied Miniel's request for habeas relief. *Miniel v. Cockrell,* Civil Action No. H-00-4361, slip op. (S.D. Tex. Oct. 29, 2001) (unpublished opinion); Petitioner's Appendix 35-68 (redacted

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[4] "SHTr" refers to the state habeas transcript followed by page number. "Tr" refers to the trial transcript (or clerk's record) followed by page number.

copy). Also, the district court denied Miniel a COA on his claims. *Miniel v. Cockrell,* slip op. at 122-23.

On appeal, the lower court denied COA with respect to the claims before the Court. Specifically, the court found that Miniel's mitigating evidence proffered to the jury of drug and alcohol use at the time of the offense, youth, good behavior while incarcerated, and religious conversion were not beyond consideration under the special issues[5] and that evidence not proffered to the jury could not form the basis of a complaint regarding the absence of a mitigating evidence instruction. *Miniel v. Cockrell*, 339 F.3d 331, 337-38 (5th Cir. 2003). The court also found that the district court's resolution of Miniel's complaints regarding his counsel's performance during sentencing had not been shown to be debatable or wrong, at least as to the deficient performance prong on one claim and the prejudice prong on the other. *Id.* at 344-48. Rehearing was denied by the lower court on August 18, 2003. Petitioner's Appendix 29-30. This proceeding followed.

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[5] The following two special issues were submitted to the jury at sentencing:

> Was the conduct of the Defendant, Peter J. Miniel, that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Is there a probability that the defendant, Peter J. Miniel, would commit criminal acts of violence that would constitute a continuing threat to society?

Tr 338-39.

ARGUMENT

I. The Questions Presented for Review Are Unworthy of the Court's Attention.

The Rules of the Supreme Court provide that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for "compelling reasons." SUP. CT. R. 10 (West 2003). Miniel advances no compelling reason in this case, and none exists. As a result, certiorari review should be denied. Moreover, this proceeding is governed by the Antiterrorism and Effective Death Penalty Act of 1996, which states in relevant part that:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim —
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d) (West 2003).

This Court has held that a state court decision is "contrary" to established federal law if the state court "applies a rule that contradicts the governing law set forth in [the Court's] cases," or confronts facts that are "materially indistinguishable" from a relevant Supreme Court case, yet reaches an opposite result. *Williams v. Taylor,* 529 U.S. 362, 405-06 (2000). A state court "unreasonably applies" clearly established federal law if it correctly identifies the governing precedent but unreasonably applies it to the facts of a particular case. *Id.* at 407-09.

The Court also held that a federal habeas court's inquiry into reasonableness should be objective rather than subjective, and a court should not issue the writ simply because that court concludes in its independent judgment that the relevant state court decision applied clearly established federal law erroneously or incorrectly. *Williams,* 529 U.S. at 409-11. Rather, federal habeas relief is only merited where the state court decision is both incorrect *and* objectively unreasonable, "whether or not [this Court] would reach the same conclusion." *Id.* at 411; *Woodford v. Visciotti,* 123 S. Ct. 357, 361 (2002). The Fifth Circuit has explained that it is the state court's "ultimate decision" that is to be tested for reasonableness, "not every jot of its reasoning." *Santellan v. Cockrell,* 271 F.3d 190, 193 (5th Cir. 2001), *cert. denied,* 535 U.S. 982 (2002).

Additionally, unless Miniel obtained a COA, the lower court had no jurisdiction to hear his claims on appeal. *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). To obtain a COA, Miniel was required to make a substantial showing of the denial of a constitutional right, a demonstration which includes showing that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Slack v. McDaniel,* 529 U.S. 473, 483-84 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)); *Miller-El*, 537 U.S. at 336 (quoting *Slack* and

Barefoot). As this Court explained in *Miller-El*,

> The COA determination under § 2253(c) requires an overview of the claims in the habeas petition and a general assessment of their merits. We look to the District Court's application of AEDPA to petitioner's constitutional claims and ask whether that resolution was debatable amongst jurists of reason. . . .

537 U.S. at 336.

Importantly, "a COA does not require a showing that the appeal will succeed" and "a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El*, 537 U.S. at 337. On the other hand, "issuance of a COA must not be pro forma or a matter of course" and a "prisoner seeking a COA must prove something more than the absence of frivolity or the existence of mere good faith on his or her part." *Id.* at 337-38 (internal citation and quotations omitted).

As discussed below, the lower court conducted the appropriate threshold inquiry in light of this Court's decision in *Miller-El*, found that Miniel's COA application did not meet these standards and, therefore, denied a COA. This determination should be upheld, and certiorari review should be denied.

II. The Court of Appeals Properly Held that the District Court's Application of the AEDPA to Miniel's Ineffective Assistance of Counsel Claims Was Not Debatable or Wrong.

Miniel complains that he was denied constitutionally effective counsel during the punishment phase of trial because counsel failed to adequately investigate Miniel's mental condition and family background. However, the district court here correctly applied the AEDPA to the state court decision and found that Miniel failed to establish the objective unreasonableness of that decision.

A. The *Strickland* standard

In order to establish a Sixth Amendment ineffective assistance of counsel violation, a habeas petitioner must affirmatively prove that: (1) in light of all the circumstances as they appeared at the time of the conduct, "counsel's representation fell below an objective standard of reasonableness," *i.e.*, counsel's performance was deficient under "prevailing professional norms;" and (2) the resultant prejudice was "so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687-88, 690. The failure to prove either element is fatal to the claim. *Id.* at 697.

In applying the "deficiency" prong, judicial scrutiny of counsel's performance "must be highly deferential," with every effort made to avoid "the distorting effect of hindsight" and to "evaluate the conduct from counsel's perspective at the time." *Wiggins v. Smith*, 123 S. Ct. 2527, 2536 (2003); *Strickland,* 466 U.S. at 689-90. Accordingly, there is a "strong presumption" that the alleged deficiency "falls within the wide range of reasonable professional assistance," and this Court may "not find ineffective assistance of counsel merely because it disagrees with counsel's trial strategy." *Bell v. Cone,* 535 U.S. 685, 698 (2002); *Strickland,*

466 U.S. at 689.

Counsel has a duty to make reasonable investigations on behalf of his client. *Strickland,* 466 U.S. at 690-691. As the Court recently explained:

> In light of [*Strickland* and *Williams*], our principle concern in deciding whether [trial counsel] exercised "reasonable professional judgmen[t]" is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence ... *was itself reasonable.* In assessing counsel's investigation, we must conduct an objective review of their performance, measured for "reasonableness under prevailing professional norms," which includes a context-dependent consideration of the challenged conduct as seen "from counsel's perspective at the time."

Wiggins, 123 S. Ct. at 2536 (internal citations omitted, emphasis in original).

However, "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins,* 123 S. Ct. at 2535 (quoting *Strickland,* 466 U.S. at 690-91). This is because "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Id.* at 2541. "Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case." *Id.*

Finally, in order to prove prejudice, a habeas petitioner must show a reasonable probability that, but for counsel's assumed deficiencies during punishment, the jury "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death;" a "reasonable probability" is one sufficient to undermine confidence in the outcome. *Wiggins,* 123 S. Ct. at 2542; *Strickland,* 466 U.S. at 694-95. However, "it is insufficient to show only that the errors had some conceivable effect on the outcome of the proceeding." *Williams,* 529 U.S. at 394; *Strickland,* 466 U.S. at 693.

B. Factual background and disposition in state court

When Miniel first raised the instant claims during state habeas proceedings, he included several affidavits from various friends and family members which purportedly chronicled his personal history.[6] The substance of those affidavits was summarized by the federal district court as follows:

> . . . . Miniel was the illegitimate child of Carmen Cantu, who allowed her sister's family to adopt him shortly after birth. Until age ten, Miniel thought that he was born into his adoptive family. When he found out that he had been adopted, the other family members taunted him, and his behavior changed for the worse. The affidavits speak of Miniel's adoptive father as a violent alcoholic, who severely beat his children, especially Miniel.

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[6] Affidavits attached to the instant petition as Petitioner's Appendix 113-51 appear to be among those submitted to the state habeas court.

> Miniel apparently had a stormy home life, in constant contention with his adoptive parents and siblings. Miniel began abusing drugs and alcohol at a very young age. The affidavits note that Miniel had been involved in motor vehicle accidents that profoundly affected him. The affidavits also chronicle a history of suicidal behavior by the Miniel family. Each of Miniel's family members state that trial counsel only spoke with them briefly. They state that counsel never talked with them about testifying or asked them any questions about Miniel.

Miniel v. Cockrell, slip op. at 107-08; Petitioner's Appendix 62.

Miniel also presented the state habeas court with a "neurological and psychological evaluation," which appears to be the same as attached to the instant petition at Petitioner's Appendix 97-112. That evaluation concluded that Miniel "suffers from mild to moderate neuropsychological brain impairment." Petitioner's Appendix 110. The report suggested that this dysfunction "limits his ability to think, reason, and control impulses." *Id.* Additionally, the evaluation stated that Miniel's brain dysfunction and symptoms of "Post Traumatic Stress Disorder" caused him to act in a "highly impulsive," "irrational," and "often explosive manner." *Id.* at 111.

Included in the State's response to the petition was an affidavit from trial counsel, which appears to be the same as that attached to the instant petition at Petitioner's Appendix 152-57. Counsel noted that although he had "numerous conversations" with Miniel, he never observed any mental health problems or signs of mental retardation. *Id.* at 153. Also, when counsel asked Miniel about any history of substance abuse, Miniel only referred to his intoxication on the night of the crime. *Id.* Counsel stated that he could not recall whether he asked Miniel about the

possibility of childhood abuse. *Id.* Counsel related that he spoke to Miniel's family prior to trial, including phone conversations with Miniel's father, but indicated that he was not told about any negative aspects of Miniel's upbringing. *Id.* Counsel also recalled that although Miniel's father, mother, and sister were present for part of Miniel's trial, his father and mother returned to their out-of-state home after listening to a portion of the State's case-in-chief. *Id.* at 155-56. Miniel's sister did not testify at trial because "she did not want to get involved." *Id.* at 156. Indeed, counsel stated that he could "not ascertain whether there was anything favorable that individual family members could say about Miniel as the family did not seem to have warm feelings about him." *Id.* Those feelings were apparently so indifferent that counsel recalled that he "was not even sure that they would ask the jury to spare Miniel's life." *Id.* Even after Miniel's father left, the remaining family refused to testify on Miniel's behalf. *Id.* Counsel stated that he did not "push the issue as I felt that, aside from the family's reluctance to testify and the possibility that they would make a poor impression on the jury, Miniel's family would have been vulnerable on cross-examination because Miniel had not been a model child." *Id.*

The state habeas court found that trial counsel's affidavit was credible. Petitioner's Appendix 73-74. It found that Miniel was involved in all of the strategic decisions that took place during trial. *Id.* The court also noted that despite the mitigating evidence included in the family members' affidavits, none of those individuals indicated that they would have been available and willing to testify on Miniel's behalf. *Id.* at 74. The court specifically found trial counsel's explanation that the family members did not want to participate or get involved to be credible. *Id.* The court therefore concluded that Miniel had failed to demonstrate either deficient performance or prejudice, noting that he had not shown that there were witnesses willing to testify on his behalf or that their testimony would have benefitted the defense. *Id.* at 85.

The state court also concluded that trial counsel was not deficient for failing to uncover any mental deficiencies. The court noted that Miniel had been evaluated prior to trial by clinical psychologist Dr. Jerome Brown, who concluded that Miniel was sane at the time of the offense and was competent to stand trial. *Id.* at 74-75; Tr 34-37.[7] The court noted that Miniel did not reveal any history of physical or emotional abuse to Dr. Brown during their interview. Petitioner's Appendix 75. The court found that counsel's observations were consistent with those of Dr. Brown in that Miniel "failed to demonstrate any signs of psychological problems or mental illness." *Id.* Ultimately, the court concluded that counsel was not ineffective in failing to have Miniel evaluated by another psychological expert. *Id.* at 86.

C. Federal court resolution

As to Miniel's claim of counsel's failure to discover the possibility of mental or psychological disorders, the federal district court found that the state court decision was not objectively unreasonable and the lower court, in turn, found that the district court's decision was not debatable or wrong. *Miniel*, 339 F.3d at 345. Initially, the state court's credibility choice in favor of counsel's averments, as set forth above, was entitled to deference under 28 U.S.C. § 2254(e) and compelled rejection of this claim. Indeed, both of the lower federal courts found that there was nothing in the record to suggest that counsel was or should have been alerted to any potential mental deficiencies. *Miniel*, 339 F.3d at 345; *Miniel v. Cockrell,* slip op. at 112; Petitioner's Appendix 65. Miniel's present disagreement with the lower state and federal courts' rejection of this claim amounts to nothing more than requesting this Court to announce that counsel are obliged to shop

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[7] Dr. Brown also estimated Miniel's intellectual capacity in the average range, and related that he failed to observe any indications of severe mental illness or mental defect. Tr 36.

for psychological impairment evidence or experts when the potential presence of such impairment evidence is not observed or indicated through counsel's, and a court-appointed mental health expert's, interactions with a defendant. This is not the law, as the lower court aptly noted. *Miniel*, 339 F.3d at 345; *see Dowthitt v. Johnson,* 230 F.3d 733, 748 (5th Cir. 2000) (holding that "trial counsel was not deficient by not canvassing the field to find a more favorable defense expert"), *cert. denied,* 532 U.S. 915 (2001); *Barnard v. Collins,* 958 F.2d 634 (5th Cir.1992) (where defense counsel had no reason to suspect that petitioner suffered from mental defect, failure of counsel to conduct an investigation into such matters not deficient performance), *cert. denied,* 506 U.S. 1057 (1993).

As to Miniel's claim of counsel's failure to discover evidence of a deprived and abusive family background, the most glaring flaw in this claim, as found by the state and federal district courts, is that none of the family members state in their affidavits "that they would have presented such testimony in the punishment phase of trial, or that they were even inclined to stay for the whole trial." *Miniel v. Cockrell,* slip op. at 111; Petitioner's Appendix 65, 74. Claims regarding missing witnesses must include such averments to plead a prima facie Sixth Amendment violation. *See, e.g., Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) (holding that "to demonstrate the requisite *Strickland* prejudice, the appellant must show not only that this testimony would have been favorable, but also that the witness would have testified at trial.") (citations omitted); *United States v. Foster*, 128 F.3d 949, 952 (6th Cir. 1997) (holding that "in order to justify a continuance for the purposes of locating a witness, the moving party must show [among other things] that the witness . . . was available and willing to testify."); *United States v. Olaniyi-Oke*, 199 F.3d 767, 771-72 (5th Cir. 1999) (same). For this reason alone, the lower courts' rejection of this claim was entirely correct.

Further, the state court found, as presumptively correct factual matters under 28 U.S.C. § 2254(e), that counsel "spoke to [Miniel's] family members who were present for part of the trial and that they did not want to participate or get involved; that they did not appear to have warm feelings about the applicant; and that when asked specifically by trial counsel that someone should testify that applicant should not get the death penalty, none of the applicant's family wished to do so." Petitioner's Appendix 74. Thus, faced with a dearth of useful mitigating evidence from either Miniel or his family, counsel instead built a punishment case based on the perception that Miniel had made a sincere effort to reform since his arrest. Specifically, counsel presented the jury with Miniel's good conduct record from the year-and-a-half since Miniel had been arrested. Counsel also adduced testimony from a woman who had visited Miniel in jail, had discussed religion with him, and had formed the opinion that Miniel was sincerely devoted to his faith. Finally, counsel presented testimony from a jail chaplain, who indicated that Miniel had been a devoted attendant of the religious services he administered and who stated that Miniel's attitude had changed during the time he had been in jail. Based on this evidence, counsel could credibly argue that there was no probability that Miniel would pose a continuing threat to society if allowed to live.

The record supports the state courts' conclusion that defense counsel's investigation of Miniel's background was not unreasonable. Counsel sought information from both Miniel and his family regarding potential mitigating evidence, but was unable to uncover any useful information. Indeed, counsel was also concerned that calling family members as witnesses could leave them vulnerable to cross-examination regarding Miniel's juvenile criminal history. Moreover, as noted above, those family members whom counsel encouraged to testify indicated that they did not want to participate in Miniel's trial. This reluctance on the part of the family, coupled with counsel's sense that they did not have "warm feelings" for Miniel and could potentially hurt them on

cross-examination, led counsel to conclude that they would not make good witnesses for the defense. These decisions were certainly reasonable in light of the circumstances and did not fall outside the "wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. As such, the federal district court correctly denied Miniel's claim because the state court's decision was not objectively unreasonable. *Miniel v. Cockrell,* slip op. at 110-13; Petitioner's Appendix 65-66.

Further, even assuming counsel's performance deficient, the lower federal courts correctly found that the "missing" evidence was not of such a character as to produce a reasonable probability that the jury would have answered one of the two special issues in the negative. Specifically, in concluding that the state court decision was not objectively unreasonable, the district court found:

> . . . . During the punishment phase of Miniel's trial, the State introduced evidence of many prior offenses committed by Miniel in Illinois, including aggravated battery with numchucks; two unlawful-use-of-weapons charges; a retail theft charge; and a charge of disorderly conduct. The State also presented evidence of Miniel's poor parole history. The State demonstrated that Miniel did not have a reputation as a peaceful and law-abiding person.
>
> When comparing Miniel's violent history, including the horrific manner in which he killed Manier,[8] with the potential testimony that

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[8] After his brutal murder of Manier and stealing the few things of value he could find, Miniel threatened to kill his accomplice with a shotgun because he had "messed up" and "couldn't do anything right." 25 SR 110-14, 116-19.

centered on childhood abuse and substance abuse, there is no reasonable probability that the jury would have answered the special issues in a different manner. Specifically, Miniel's past violent behavior would overwhelm any of the proposed mitigating evidence in determining future dangerousness. In sum, the proposed mitigation evidence "would have had little mitigating effect against the evidence. . . ." *Lamb [v. Johnson]*, 179 F.3d [352,] at 360 [(5th Cir. 1999)]. Miniel has failed to present "evidence of sufficient quality and force to raise a reasonable probability that, had it been presented to the jury, a life sentence would have resulted." *See Andrews v. Collins*, 21 F.3d 612, 624 (5th Cir. 1994), *cert. denied*, 513 U.S. 1114 (1995).

Furthermore, the evidence presented in the family affidavits is not unequivocally mitigating. There is no prejudice to a defendant when counsel fails to present evidence that would have been detrimental to the defense. *See Ransom [v. Johnson]*, 126 F.3d [716] at 724 [(5th Cir. 1997)]; *Cockrum v. Johnson*, 119 F.3d 297, 304 (5th Cir. 1997) (failure to investigate mitigating evidence did not prejudice the defendant because of the double-edged nature of the evidence). "Evidence of a defendant's abuse-filled, violent upbringing and abuse of drugs and alcohol frequently can be 'double-edged.'" *Williams v. Cain*, 125 F.3d 269, 278 (5th Cir. 1997), *cert. denied*, 525 U.S. 859 (1998).

Miniel's mitigating evidence may have harmed his defense. For instance, Miniel's sister reveals that at the time of his arrest Miniel confronted the police with a shotgun, only lowering the weapon in

> response to her pleas. Also, the accidents that some members pointed to as deeply impacting Miniel's life occurred as a result of intoxication. Additionally, the affidavits recognize that Miniel had opportunities to seek help for his substance dependency, but did not avail himself of those opportunities. Likewise, the psychological evidence about Miniel's violent tendencies may have confirmed his future danger to society.
>
> The state court determination that trial counsel did not render ineffective assistance in failing to present mitigating evidence is not contrary to, or an unreasonable application of, federal law. *See* 28 U.S.C. § 2254(d)(1).

Miniel v. Cockrell, slip op. at 113-15 (internal record citations omitted); Petitioner's Appendix 66-68. Reviewing the claim under *Strickland*, and mindful of this Court's recent decisions in *Wiggins v. Smith*, *supra*, and *Williams v. Taylor, supra*, the lower court found that the correctness of the district court's assessment of the claim was not debatable. *Miniel*, 339 F.3d at 346-48 & n.10.

Miniel argues that the lower court erred in its prejudice analysis because the court failed to weigh the additional mitigating evidence in light of the entire record and improperly limited *Wiggins* and *Williams* to their specific facts. However, the lower court, like the district court before it, properly assessed prejudice on the entirety of the record, specifically including the additional mitigating evidence. *Miniel*, 339 F.3d at 346-48; *Miniel v. Cockrell,* slip op. at 113-15; Petitioner's Appendix 66-68. That the lower court commented on the extent and quality of the additional evidence here as compared to that presented in *Wiggins* and *Williams*, *Miniel*, 339 F.3d at 347 n.10, does not equate to the court limiting *Wiggins* and *Williams* to their specific facts. Rather, the lower court, as the federal district court before it, was simply

not persuaded by the additional evidence in light of the other record evidence in this case. Further, the extent and quality of the additional evidence presented in *Wiggins* and *Williams* were essential to this Court's conclusion in those cases that prejudice was shown. *See, e.g., Wiggins*, 123 S. Ct. at 2542-44 (considering "the nature and the extent of the abuse petitioner suffered"; describing petitioner's life history as "excruciating" and the additional evidence as "powerful").

III. Miniel's Claim Regarding a Mitigating Evidence Instruction Is Not Properly Before the Court.

Miniel complains that the lower court erred in rejecting his claim that the special issues precluded the jury from considering mitigating evidence, contrary to the Court's decisions in *Penry v. Lynaugh*, 492 U.S. 302 (1989), and *Penry v. Johnson*, 532 U.S. 782 (2001). However, Miniel entirely fails to allege what mitigating evidence his jury was precluded from considering. Petition at 21. He also entirely fails to brief how the lower courts erred in rejecting this claim. For these reasons, nothing is presented for review.

In any event, the lower courts correctly found that the mitigating evidence actually presented at trial (drug and alcohol use at the time of the offense, youth, good behavior while incarcerated, and religious conversion) was not beyond the scope of the special issues and that Miniel could not premise a *Penry* claim on evidence not presented at trial (emotional trauma upon learning he was adopted, alcoholic father, history of abuse as a child, history of drug and alcohol abuse, a pattern of suicide attempts and substance abuse of family members, and evidence of impairment of mental, academic, social, and behavioral functioning). *Miniel*, 339 F.3d at 337-38; *Miniel v. Cockrell,* slip op. at 86-94; Petitioner's Appendix 50-58. . Moreover, relief is foreclosed under the AEDPA standard of review and *Teague v. Lane*, 489 U.S. 288 (1989).

CONCLUSION

For the foregoing reasons, Miniel fails to prove the lower court erred in disposing of his claims, and certiorari review should be denied.

Respectfully submitted,

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